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NO. 80-_____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

GEORGE W. FULK, THOMAS W. SHELTON,
AND WILLIAM F. SUDDETH,

PETITIONERS

V.

DAVID R. JOHNSTON, THE NORTHWESTERN BANK
AND JAMES R. GILLEY,

RESPONDENTS

MEMORANDUM IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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R. A. Gilbert, Trustee in
Reorganization

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R. A. Gilbert, Trustee in Reorganization of The Washington Group, Inc. and its subsidiaries, as an interested party, hereby tenders this Memorandum in support of the Petition of George W. Fulk, Thomas W. Shelton and William F. Suddeth for a Writ of Certiorari to review the Judgment of the

United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

All relevant opinions below are accurately identified in the Petition.[1]

JURISDICTIONAL STATEMENT

The jurisdictional statement filed with the Petition is hereby adopted by the Respondent.[2]

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are accurately set forth in the Petition.[3]

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[1] Petition at 1.

[2] Id. at 1.

[3] Id. at 2.

STATEMENT OF THE CASE

The Respondent hereby adopts the Statement of the Case set forth in the Petition,[4] with the following exceptions. First, it is stated on page 3 of the Petition that "In his report, the Trustee found substantial evidence of 'mismanagement on the part of certain of the officers/directors of the [Companies] or others acting in fiduciary capacities,' particularly in connection with the Companies' employee benefit plans. (Footnote deleted) Trustee's Report at 55." The language quoted does not refer to the employee benefit plans but refers only to the total claims to be asserted by the Trustee on behalf of the reorganizing Companies against certain former

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[4] Id. at 2.

officers and directors. The employee benefit plans are not mentioned by the Trustee until Page 98 of his Report.[5] Secondly, it is also noted on page 3 of the Petition that "proceeds from the sale of these 'blue chip' stocks were then invested in the common stock of the Companies." This statement is only partially correct. A portion of the proceeds were also invested in nonequity assets. Thirdly, it is stated on page 4 of the Petition that "additional authorization was sought 'to expend funds of the

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[5] The Trustee conducted an investigation of the debtors pursuant to Rule 10-208(a) of the Federal Rules Of Bankruptcy Procedure. The Trustee's Report, which was filed on June 20, 1978, is a part of the record in this case and can be found at pages 11-257 of the Appendix to the Appellants' Brief in the proceeding below.

[Companies] to assist in the prosecution of actions... for the recovery of losses resulting from these mismanaged profit-sharing plans....'" (citations omitted) The Trustee's Report contained a recommendation that he be authorized to expend the funds of the Companies, but did not actually request such authorization. However, subsequent to the filing of the Report, the Trustee did in fact make applications for such funding to the Bankruptcy Court. Lastly, it is noted on page 4 of the Petition that "Relying on this Order and the Trustee's stated willingness to defray the costs of an employee law suit, certain present and former Washington Group employees--- the petitioners before this Court---filed a civil class action...." This language

would seem to indicate that the Trustee had some authority independent of the July 21, 1978 Order to assist in the funding of the employees' law suit. The Trustee, of course, has no such independent authority. The Trustee's application to the Bankruptcy Court that he be authorized to take such action gives rise to this proceeding. With the exception of the minor corrections noted above, the Respondent adopts the remainder of the Statement of the Case set forth in the Petition.

REASONS FOR RESPONDENT'S SUPPORT FOR THE GRANTING OF THE WRIT

Respondent adopts in large part the arguments set forth by the Petitioners in support of their Petition for a Writ of

Certiorari. In order to avoid an undue repetition of the Petitioners' arguments, the Respondent would note in summary fashion the following grounds for the allowance of the Writ. First, the lower courts' determination that it was inappropriate for the Trustee to fund the costs of the civil action brought by the employees in District Court was based upon a misinterpretation of the decision of this Court in Caplin v. Marine Midland Grace Trust Company, 406 U.S. 416 (1972). [6] Secondly, the decision of the Fourth Circuit Court of Appeals to uphold the reversal by the District Court of the funding orders of the Bankruptcy Court not only places the Fourth Circuit in conflict with the decision of the Ninth

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6 See Petition at 16 - 18.

Circuit Court of Appeals in In Re Equity Funding Corporation of America, 519 F.2d 1274 (9th Cir. 1975), but also brings the Fourth Circuit into conflict with its own decision in In Re Farrington Manufacturing Company, 540 F.2d 653 (4th Cir. 1976).[7] Respondent believes that each of the above arguments, standing alone, provides a sufficient basis for the granting of the Petition. A consideration of these arguments as a whole makes the granting of the Petition that much more compelling.

The Respondent's primary purpose in filing this Memorandum is to fully advise the Court of the reasons for which the Respondent sought the funding orders from the Bankruptcy Court. It should first be

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7 Id. at 18 - 20.

noted that at all times subsequent to the completion of his Rule 10-208 investigation, the Trustee has supported the funding by the Debtors of the costs of a civil action brought in District Court on behalf of the employees aggrieved by the mismanagement of the profit-sharing plan.[8] Furthermore, it remains the intention of the Trustee to apply for an order permitting him to assist in the defraying of such costs should this Court so allow. At the time of the original funding order of July 21, 1978, the Respondent fully recognized that there was a potential that the employees would become claimants in the Bankruptcy Court at some future

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8 The trustee joined with the Petitioners in the Court below in supporting the allowance of funding by the trustee of the costs of the employees' suit.

date.[9] The employees have attempted to become claimants in the Bankruptcy Court by way of multiple proofs of claim filed on behalf of the employees by the Petitioners in this proceeding. By seeking Orders which permitted him to assist the employees in the funding of their civil action in District Court, the Respondent hopes to reduce potential claims against the debtors by an amount which conceivably might total approximately 2.8 million dollars. Thus the debtors would derive a substantial benefit from the Trustee's funding of the costs of the employees' action in District Court.

Poor employee morale became a sizeable problem following the Debtors'

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[9] Id at 6, 19a.

filing for corporate reorganization.[10] The Trustee believes that the "morale of the Debtors' employees would be vitally improved" through the prosecution of an action against the parties responsible for the losses to the profit sharing plans. [11] Because the employees are alleged to have insufficient resources to defray the costs of a District Court action, the Trustee believes it to be in the best interest of the Debtors that an Order issue permitting the Companies to fund the costs of the employees' litigation. The Trustee believed this to be true at the time he filed his Rule

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[10] See Appendix to the Appellant's Brief in the proceeding below at page 98.

[11] Id. at 99.

10-208(a) Report and he maintains that belief at this time.

CONCLUSION

For the reasons stated above, and for the reasons set forth in the Petition not inconsistent with this Memorandum, this Court should grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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